In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
a California corporation,
Petitioner

vs.

MIDCAL ALUMINUM, INC., a California corporation,
Respondent

BAXTER RICE as Director of the Department of
Alcoholic Beverage Control of the State of California
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California in and for the Third Appellate District

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QUESTIONS PRESENTED

1. Does the Twenty-first Amendment immunize conduct otherwise prohibited by the Sherman Act, so as to permit the California Department of Alcoholic Beverage Control to enforce statutes requiring wine growers to post absolute prices at which a California wholesaler must sell to a California retailer, and minimum prices at or above which a California retailer must sell to a consumer for off-premises consumption?

2. Are California statutes which require wine growers to post absolute prices at which California wholesalers

must sell to California retailers, and minimum prices at or above which California retailers must sell to consumers for off-premises consumption invalid under the Sherman Antitrust Act?

3. Does the state action exemption insulate from the prohibitions of the Sherman Act a statutory scheme by which wine growers, subject to no control or review by the state, are required to dictate the prices at which California wholesalers must sell to California retailers and minimum prices at or above which California retailers must sell to consumers for off-premises consumption?

STATEMENT OF THE CASE

California has codified a comprehensive statutory scheme to regulate the alcoholic beverage industry in California (California Business and Professions Code Section 23000 et seq., known as the Alcoholic Beverage Control Act). A significant portion of the Act is aimed at promoting orderly marketing conditions and regulating the sale of alcoholic beverages. Primary reliance is placed on the use of fair trade contracts and posting of prices with the Department of Alcoholic Beverage Control.

The sale and resale of distilled spirits are governed primarily by sections 24755 and 24756 of the California Business and Professions Code. Section 24755 requires a brand owner to file monthly with the Department of Alcoholic Beverage Control a minimum retail price schedule for distilled spirits bearing the name of the brand owner (subdivisions (a) and (c)). Subdivision (f) provides that no licensee shall sell a package of distilled spirits for consumption off premises at a price less than the effective

price filed with the Department in accordance with subdivisions (a) and (c).

Pursuant to Sections 24755 and 24756, distilled spirits and brandy manufacturers and wholesalers must file with the Department of Alcoholic Beverage Control a price list showing the prices at which their distilled spirits are sold to retailers. That section further provides that sales to retailers must be in compliance with such price lists.

Wine prices may be set by wine growers either by means of a fair trade contract (Business and Professions Code Section 24750.5) or by filing an effective price schedule with the Department of Alcoholic Beverage Control. Such schedule shall contain prices at which the wholesaler shall sell to the retailer, and minimum prices at which the retailer may sell to the consumer (Business and Professions Code Section 24866).

Section 24862 provides that no licensee shall sell or resell to a retailer, nor shall a retailer purchase, any item of wine except at the listed price or at the price contained in a fair trade contract. Section 24862 further provides that a licensee may not sell to a consumer at a price less than that contained in a fair trade contract or posted with the Department of Alcoholic Beverage Control.

In *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), the California Supreme Court declared the price maintenance provisions contained in California Business and Professions Code Section 24755 invalid. In *Rice,* a retailer was accused of selling various packages of distilled spirits at prices below the posted minimum consumer price. Follow-

ing an evidentiary hearing, the Department suspended the retailer's license for 10 days. The retailer appealed the decision to the Alcoholic Beverage Control Appeals Board, arguing, *inter alia,* that Section 24755 violated the Sherman Antitrust Act (15 U.S.C. Section 1) and was therefore invalid. The Board agreed, and reversed the decision of the Department. The Department then appealed the decision of the Board.

The California Supreme Court undertook an exhaustive review of the Sherman Act, the Twenty-first Amendment, and the inter-relationship between those two provisions. The Court held that resale price maintenance provisions contained in Business and Professions Code Section 24755 contravened the Sherman Act, and were not insulated therefrom by the so-called "state action" exemption first announced in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Court further held that the Twenty-first Amendment does not prevent the application of the Sherman Act prohibition to the price fixing of distilled spirits. The Court balanced the policies underlying the Sherman Act against the stated goals of the price maintenance statutes (i.e., temperance and orderly marketing conditions) and found that while there is a clear national trend against fair trade laws, the effectiveness of California's liquor price maintenance provisions in achieving their stated goals was doubtful. Thus, the California Supreme Court declared the price maintenance provisions invalid.

Shortly after the *Rice* decision, the California electorate, through the initiative process, approved an amendment to the California Constitution which prohibits an administrative agency from declaring a statute unenforceable until an appellate court has so held. (California Constitution, Art. III, Section 3.5, approved June 6, 1978.) Alluding to that provision, the director announced that because Section 24755 dealt only with minimum consumer price filings for distilled spirits and beer, other price filing requirements of California law would continue to be enforced, including the wine resale price maintenance provisions of Sections 24862 and 24866, described above.

The constraints cited by the director also impacted upon the Alcoholic Beverage Control Appeals Board. In a case arising subsequent to *Rice,* a licensee appealed a decision of the Department which had imposed disciplinary action pursuant to a finding that the licensee had sold wines below the minimum consumer prices. In reviewing the findings of the Department, the Board stated that while the *Rice* decision appeared applicable to Business and Professions Code Section 24862, California Constitution, Art. III, Section 3.5 prohibited the Board from declaring that provision invalid. Subsequently, the matter was appealed to the California Court of Appeal, First Appellate District, where Section 24862 was declared invalid as it pertains to minimum consumer resale prices. (*Capiscean Corporation v. Alcoholic Beverage Control Appeals Board,* 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979)).

On August 15, 1978, an Accusation was filed against Respondent Midcal Aluminum, Inc., alleging that Respondent sold items of bottled wine to retailers in California at other than prices posted by the brand owner, or for which no prices had been posted by the brand owner. Respondent entered into a stipulation dated August 15,

1978, in which Respondent admitted to the truthfulness of the facts set forth in the Accusation, and further agreed that the Department of Alcoholic Beverage Control could, subject to a judicial determination of the validity of the wine price posting provisions, impose a monetary penalty or suspension of Respondent's licenses as provided in the Alcoholic Beverage Control Act.

Respondent thereupon filed in the California Court of Appeal, Third Appellate District, a timely Petition of Writ of Mandate. The relief sought therein included a dismissal of the Accusation and an Order of that Court enjoining further enforcement of the wine price posting statutes and regulations promulgated thereunder, as well as a judicial determination that the statutes are invalid and unconstitutional. The Court held that the statutes relating to resale price maintenance of wine were substantially similar to the statutes relating to price maintenance of distilled spirits found to be invalid in *Rice*. Further, the Court found no significant difference between resale price maintenance at the wholesale level and resale price maintenance at the retail level.

Following the decision of the Court of Appeal, Petitioner herein, Intervenor below, filed a Petition for Rehearing, which was denied April 19, 1979. Petitioner then sought review by the California Supreme Court, which denied Petitioner's Petition for hearing on May 24, 1979.

ARGUMENT

I

The State Court Decision Is Not Contrary to Decisions of This Court Defining the Scope of The State's Authority to Regulate Alcoholic Beverages Within a State's Borders Under The Twenty-First Amendment

Petitioner argues that the Twenty-first Amendment insulates the price fixing provisions of California Business and Professions Code Sections 24862 and 24866 from the prohibitions of the Sherman Act. This contention is based upon Section 2 of the Twenty-first Amendment, which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is prohibited."

In *Rice v. Alcoholic Bev. etc. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), the California Supreme Court, in declaring the related retail price maintenance provisions of California Business and Professions Code Section 24755, and its implementing regulations, invalid as violative of the Sherman Antitrust Act, ruled that the Twenty-first Amendment does not give the states plenary powers over all matters relating to alcoholic beverages. Citing United States Supreme Court decisions, and its own recent decision in *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971), the California Supreme Court in *Rice* ruled that:

> "When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based upon the Commerce Clause, we must balance the

policies furthered by each in order to determine which should prevail." *Id.*, at p. 448.

This balancing test employed by the court in *Rice* and *Sail'er Inn,* and approved by the Third District Court of Appeal and the Supreme Court of California in the present case, is completely consistent with prior decisions of this court, and should be upheld.

Although it is established that the Twenty-first Amendment grants a state significant authority to prohibit or regulate the importation of intoxicants destined for use, distribution or consumption within its borders, it is equally well-established that such authority is not plenary and exclusive, particularly in the area of regulation of the manufacture, traffic and distribution of intoxicants within the borders of the State. See *United States v. Frankfort Distilleries,* 324 U.S. 293, 299, 65 S.Ct. 661, 89 L.Ed. 951 (1944). In *Jameson & Co. v. Morgenthau,* 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939), the Court held that, notwithstanding the Twenty-first Amendment, Congress had authority under the Commerce Clause to pass the Federal Alcohol Administration Act, (27 U.S.C. Section 205), which established broad restraints upon both intrastate and interstate liquor commerce. It was contended that the Twenty-first Amendment vested the states with complete and exclusive control over commerce in intoxicating liquors unlimited by the Commerce Clause. The Court summarily rejected this theory with the following blunt response: "We see no substance in this contention." *Jameson & Co. v. Morgenthau, supra,* 307 U.S. at pp. 172-173.

Recent United States Supreme Court decisions have recognized this principle in ruling, contrary to Petitioner's contention, that state legislation passed under the authority of the Twenty-first Amendment does not invariably take precedence over conflicting federal law. In *Hostetter v. Idlewild Bon Voyage Liquor Corporation,* 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), principally relied upon by the California Supreme Court in *Rice,* this Court clearly articulated the need to consider the Commerce Clause and the Twenty-first Amendment in juxtaposition to determine which should prevail.

In *Hostetter,* a New York retail liquor corporation brought an action to enjoin the New York State Liquor Authority from terminating the corporation's tax-free sales of bottled wines and liquors to international airline passengers for their use at foreign destinations. The state statute imposed a license requirement upon the retailer. It was contended by the retailer that the liquor license requirement imposed by the state regulation was invalid on the ground that the Commerce Clause of the United States Constitution (Article I, Section 8, Subdivision (3)), deprived the state of the authority to enact such a requirement.

The Court noted and summarized the early line of cases commencing with *State Board of Equalization of California v. Young's Market,* 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), which generally declared that the states were totally unconfined by traditional Commerce Clause limitations when restricting the importation of intoxicants. A review of *Young's Market* and its progeny led the Court

to the conclusion that such case law was not in keeping with the original intent of the Amendment, and was not dispositive in the matter before the Court. The Court explained:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corporation, supra,* 377 U.S. at pp. 331-332. See also *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42, 86 S.Ct. 1254 (1966).

The *Hostetter* Court continued by articulating the following balancing test to be employed when ruling upon the validity of a state liquor statute which conflicts with the Commerce Clause:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S., at p. 332.

The Court in *Hostetter,* after balancing the policies and interests served by the conflicting federal and state provisions, declared the New York statute unconstitutional. In so ruling, the Court emphasized that the interests of the Twenty-first Amendment were not substantially served by

the state statute because it did not regulate the transportation or importation of liquor into the state. *Id.,* at pp. 332-333.

The ruling in *Hostetter* is extremely persuasive in the present case. In *Hostetter,* as in the case at bench, the state liquor regulation in question governed distribution of intoxicants from within the state, rather than the importation of liquor. The language and ruling of this Court in *Hostetter* clearly indicate that the California Supreme Court in *Rice* properly adopted and applied the balancing test to determine the constitutional validity of a state liquor law which regulated intrastate distribution and sale of intoxicants in a manner inconsistent with the dictates of the Sherman Act.

Decisions of this Court since *Hostetter* have consistently recognized that the Twenty-first Amendment is not a panacea which works to render all state liquor laws valid. In *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the Court was asked to rule on the constitutionality of a Wisconsin statute pursuant to which the plaintiff's name was publicly posted in retail liquor outlets, without prior notice or opportunity to be heard, as one to whom intoxicating beverages should not be sold. The Court declared the statute unconstitutional on procedural due process grounds notwithstanding the police power extended to the state by the Twenty-first Amendment. *Id.,* at p. 436.

Contrary to Petitioner's assertions, *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), is the most recent expression of the Court's position regarding the

Twenty-first Amendment vis-a-vis the Commerce Clause. In *Craig,* the Court considered an Oklahoma statute which specified different drinking ages for men and women. The appellees argued that the statute concerned the sale and distribution of alcohol, and by force of the Twenty-first Amendment should, therefore, be able to withstand any equal protection challenge.

The Court ruled that that argument lacked merit. It was held that validity must be determined by balancing the policies served by the conflicting laws. Citing *Hostetter,* the Court explained:

> "Even here, however, the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Craig v. Boren, supra,* 429 U.S. at p. 206.

In adopting and applying this balancing test the Court noted, once again, that the line of cases which granted the states unfettered authority to regulate pursuant to the Twenty-first Amendment, "centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is abundantly clear. . . ." *Craig v. Boren, supra,* 429 U.S. at p. 207. In balancing interests, the Court ruled that such an intrastate liquor regulation which infringed equal protection rights could not withstand constitutional scrutiny. *Craig* clearly stands for the proposition that the Twenty-first Amendment does not insulate state liquor laws from constitutional attack, especially where the state regulation, as in the present case,

is directed primarily at regulating intrastate activities rather than importation.

The Petitioner claims that the decisions in *Wisconsin* and *Craig* were based upon the infringement of fundamental federal rights. Petitioner would limit the balancing test to a situation in which the state law conflicts with such a "fundamental" right. This Court's ruling in *Hostetter,* a case in which no fundamental right was involved, points out the flaw in this argument. While a federal right of "fundamental" character may contribute to balancing in favor of the federal law, it is obviously not a prerequisite to use of the balancing test. The decisions of this Court beginning with *Hostetter* clearly indicate that state liquor laws are not absolutely protected by the Twenty-first Amendment when they offend important federal policies.

A recent federal court decision has similarly interpreted the *Hostetter* line of cases. In *Lamp Liquors, Inc. v. Adolph Coors Co.,* 563 F.2d 425 (10th Cir., 1977), the trial court had dismissed the plaintiff's private antitrust action brought pursuant to the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2) on the ground that the State liquor laws authorized by the Twenty-first Amendment were in conflict with, and took precedence over, the Sherman Act remedies. The federal Circuit Court of Appeals reversed the dismissal. In discussing the effect of the Twenty-first Amendment upon federal antitrust laws, the Court stated:

> "The general import of this provision (the Twenty-first Amendment) is to prohibit importation into a state for delivery or use therein of liquor in violation of the laws of the state. Its main purpose then, would appear to have been to give a dry state power to pro-

tect itself from importation of liquor into the state for use therein. *It is also clear that the section does not undertake to approve or disapprove of trade restrictions such as those that are here complained of nor does it seek to authorize the granting of an anti-trust exception or immunity.*" (Emphasis added.) *Lamp Liquors v. Adolph Coors Co., supra,* 563 F.2d at p. 929.[1]

The federal court's ruling in *Lamp Liquors* clearly conforms to Supreme Court decisions in this area, and is persuasive in the present case because it involved an alleged conflict beween the Twenty-first Amendment and the Sherman Act, and noted the limited application of the Twenty-first Amendment in non-importation cases. The definitive statement of law which comes from the Supreme Court and federal cases in this area is that state liquor laws afforded protection by the Twenty-first Amendment must be balanced against conflicting federal legislation passed under authority of the Commerce Clause; the Amendment does not insulate such state laws from Commerce Clause attack. See also *White v. Fleming,* 522 F.2d 730 (7th Cir., 1975); *Hanf v. United States,* 235 F.2d 710 (8th Cir., 1956); *Costa v. Bluegrass Turf Service, Inc.,* 406 F.Supp. 1003 (E.D. Ky. 1975).

Petitioner's argument on this issue is based upon three cases, *California v. La Rue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra*; and *National Railroad Passenger Corporation v. Miller,* 358 F.Supp. 1321 (D.C.Kan. 1973). None

[1]In *Lamp Liquors,* the Court also went on to rule that no real conflict existed between the state's liquor laws and the Sherman Act. *Id.,* at p. 430.

of these cases are dispositive in this matter. In fact, a thorough examination of the cases reveals that they support the balancing test approach adopted by the California Supreme Court in *Rice.*

In *California v. La Rue,* this Court upheld regulations passed by the California Department of Alcoholic Beverage Control which prohibited sexual entertainment in taverns holding liquor licenses. However, the case did not cast doubt upon the Court's ruling in *Hostetter,* or the need to accommodate and balance. *La Rue* is merely a case in which the balance was struck in favor of the state regulation. In fact, the Court devoted considerable attention to balancing the regulation's infringement on First Amendment rights with the state policies served by the statute. (See *Id.,* at pp. 117-118.) Further, in *La Rue* the Court recognized the balancing test of *Hostetter. Id.,* at p. 115. In *La Rue,* the Court also specifically ruled that state liquor regulations are not immunized from constitutional attack by the Twenty-first Amendment.

Subsequent cases have interpreted *La Rue* in the manner suggested above. See *Craig v. Boren, supra,* 429 U.S. 190, 208-209, *Clark v. City of Fremont, Nebraska,* 377 F.Supp. 327, 331 (D. Neb., 1974).[2] In *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.,* 409 F.Supp. 497 (D.C. Va., 1976) the Court declared:

[2]See also Concurring Opinion of Mr. Justice Stewart in *California v. La Rue, supra,* 409 U.S. at p. 120:

"This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution."

> "An analysis of the progeny of *California v. La Rue* reaffirms that the Twenty-first Amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulations." 409 F.Supp. at 506.

Finally, in *White v. Fleming, supra,* 522 F.2d at page 734, the court explained *La Rue* as follows:

> "The subject of the ordinance here in question is, once again, liquor dispensing establishments. However, as the Supreme Court recognized in *La Rue,* 409 U.S. at 115, 93 S.Ct. at 395, this is only one circumstance entitled to weight: '. . . the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened' by the amendment, id., but other constitutional provisions are rendered inapplicable."

Joseph E. Seagram and Sons v. Hostetter, supra, 384 U.S. 35, is also a case in which the balancing approach of *Hostetter* was clearly approved, though after balancing interests the state liquor statute was upheld. In *Seagram & Sons,* this Court reviewed state statutes enacted following the repeal of fair-trade in New York, (Section 906, Chapter 531), which required distilled spirits suppliers to affirm to the state liquor authority that their prices to New York customers were no higher than prices at which similar liquor was sold anywhere in the United States during the same month. The Court upheld the statute based upon a finding that it placed no unconstitutional burden upon interstate commerce. *Id.*, at p.45.

Petitioner contends that *Seagram & Sons* is distingishable from *Hostetter,* and should govern in the present case,

because it involved a state liquor law which regulated intrastate activities. This interpretation is manifestly incorrect.

First, *Hostetter* did not involve importation or interstate activities. The New York Statute at issue in *Hostetter* imposed a licensing requirement for *in-state* sales to airline passengers.

Of more importance, the decision in *Seagram & Sons* was not based upon the fact that an "intra-state" liquor statute was involved. In *Seagram & Sons,* as in *La Rue,* the *Hostetter* balancing test was noted and approved, (*Id.*, at p. 42), and the case turned upon a finding that the state regulation was *not* in conflict with the Sherman Act. The Court explained:

> "Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country." *Id.*, at pp. 45-46.

The Court further noted that:

> *"Nothing in the Twenty-first Amendment of course, would prevent enforcement of the Sherman Act against such a conspiracy. United States v. Frankfort Distilleries,* 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951." (Emphasis added) *Id.*, at p. 46.

The Court in *Seagram & Sons* also reserved for another day the question of "whether the mode of liquor regulation chosen by a State . . . could ever constitute so grave an

interference with a company's operations elsewhere as to make the regulations invalid under the Commerce Clause." *Id.*, at p. 42-43. This was, of course, implied recognition that state liquor laws are not immune from the mandates of the Commerce Clause.

Clearly, *Seagram & Sons* is a case, like *California v. La Rue,* which, when carefully reviewed, supports the position that the Twenty-first Amendment does not exempt all state liquor laws from the prohibitions of the Sherman Act.

The Petitioner relies primarily upon the federal district court case of *National Railroad Passenger Corp., v. Miller,* 358 F.Supp. 1321 (D.C. Kan. 1973). In *Miller,* an Amtrak passenger train traveling interstate sold liquor "by-the-drink" to its passengers during passage through Kansas, in violation of the Kansas Liquor Control Act. The Plaintiff alleged that the Kansas liquor statutes placed an unconstitutional burden upon interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution.

In upholding the Kansas statutes, the Court noted that the Twenty-first Amendment and the Webb-Kenyon Act (27 U.S.C. Section 122) provide an underlying basis for state regulation of "intoxicants brought from without the state for use and sale therein, unfettered by the Commerce Clause. *Id.*, at p. 1327. However, citing *Hostetter,* the Court also emphasized that "the Twenty-first Amendment has not operated to totally repeal the Commerce Clause in the area of the regulation of liquor traffic." *Id.* Contrary to Petitioner's contention, *Miller* clearly does not compel a ruling in the present case that the California fair-trade laws are immune from Sherman Act restraints.

It must initially be noted that *Miller* is not, by virtue of its summary affirmance by this Court in 414 U.S. 948, the latest expression of Supreme Court law on this issue. In *Craig v. Boren, supra,* a well-considered opinion of this Court approved the *Hostetter* balancing test and specifically ruled that "the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Craig v. Boren, supra,* 429 U.S. at p. 206. It should also be emphasized that the state liquor statute declared invalid in *Craig* regulated in-state activities, as do the California statutes at issue in the present case.

Further, a close reading of *Miller* reveals that the Court not only recognized *Hostetter,* (*supra,* 358 F.Supp. at p. 1327), but also, in effect, engaged in a balancing process before declaring the Kansas statute valid. At pages 1327-1328 of the decision, the Court thoroughly discusses the policies served by the state law, and the importance of those policies and interests within the state of Kansas. Only after that discussion did the Court uphold the state law. *Id.,* at p. 1328.

Finally, *Miller* does not strictly involve an in-state situation. In *Miller,* Amtrak was importing liquor into the state for use within the state in contravention of state law. Respondent submits that the court in *Miller* emphasized this importation aspect in balancing in favor of the state law. Clearly, Section 2 of the Twenty-first Amendment, by its terms, has been recognized as giving the states greater power and interest over the regulation of transportation

or importation of liquor into a state. This importation factor also distinguishes *Miller* from *Hostetter.*

Finally, an interpretation of *Miller* as somehow limiting or overturning the balancing approach of *Hostetter* is inconsistent with another federal court case summarily affirmed by this Court. In *Epstein v. Lordi,* 261 F.Supp. 921 (D.C. N.J. 1966); aff'd 389 U.S. 29, 88 S.Ct. 106, 19 L.Ed.2d 29 (1967) the plaintiff sought to enjoin enforcement of a New Jersey statute which required a state-issued license for the conduct of wholesale liquor operations in New Jersey.[3] The Plaintiff contended that the statute was repugnant to the Commerce, Export-Import and Supremacy Clauses of the United States Constitution.

In *Epstein,* the court declared that a state liquor law is invalid under the following circumstances:

> "On the other hand, State regulation of liquor under the police power, as in other fields of commerce, is invalid if: (a) the subject demands national uniformity so that the State action is precluded even absent Federal action; (b) Congress has occupied the field to the exclusion of State regulation; or (c) a particular State statute conflicts directly with an express regulation by Congress. *Cooley v. Board of Wardens,* 12 How. 299, 13 L.Ed. 996 (1951); *Kelly v. State of Washington,* 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937)." *Id.,* at p. 931.

In dealing with conflict between the Commerce Clause and the state liquor regulation, the court interpreted *Hostetter* as follows:

[3]The plaintiff wholesaler was engaged in the sale of liquor to vessels docked in New Jersey.

> "On the contrary, we read Hostetter as requiring a case by case consideration of the national interests protected by the Commerce Clause, not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all to the liquor in question; in a word, whether the liquor enters New Jersey 'for delivery or use therein.'"

After considering and balancing the interests promoted by the conflicting laws, the court declared the state regulation invalid. Concededly, *Epstein* involved the sale of liquor within the state for consumption elsewhere, which favored federal rather than state interests upon balancing. However, the need to resort to the balancing test articulated in *Hostetter* and *Rice* was made clear in *Epstein.* There is no merit to Petitioner's contention that the California fair trade scheme is saved by the Twenty-first Amendment. The balancing test employed by *Rice* to resolve the conflict between a state liquor regulation and federal antitrust laws is clearly supported by the decisions of this Court.

In *Rice* the California Supreme Court considered the interests and policies of the California distilled spirits minimum price fixing scheme and the Sherman Act, and concluded that the balancing process favored the federal antitrust regulations. (See *Rice, supra,* 21 Cal.3d at p. 451-459.) In the case now before the Court, the same balancing process should obviously yield the same result.

In undertaking this balancing process, the Court is not merely seeking to discover if the state's police power under the Twenty-first Amendment has been properly exercised. Such a review would simply inquire into a rational and

reasonable basis for the state enactment. Rather, the considerations for the conflicting laws must be balanced as *Hostetter* directs.

The policies underlying the Sherman Act have been clearly stated in the case law. The aim of antitrust legislation is to protect, preserve, and prevent restraints upon free competition. See *Gordon v. New York Stock Exchange, Inc.* 422 U.S. 659, 689, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *E. J. Delaney Corp. v. Bonne Bell, Inc.* 525 F.2d 296, 302 (10th Cir., 1975); *Adams v. American Bar Assn.* 400 F. Supp. 219 (D.C. N.J. 1975).[4] In the vindication of these policies, any combination to fix prices or tamper with the price structure is unlawful. *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 386, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

The fair trade scheme in California, pursuant to the statutes here in question, has the effect of allowing, and even encouraging, vertical and horizontal restraints on competition. In a California Senate Committee Report cited in *Rice,* it was noted that the fair trade system in California "has resulted in the elimination of any semblance of competition within the industry." California Senate Select Committee Report on Laws Relating to Alcoholic Beverages Vol. I, at p. 9 (1974). The Committee also declared that because of the fair trade scheme "the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages." *Id.*, at pp. 82-83. The *Rice*

[4]In this regard see also the Sherman Act policy description of Justice Black in *Northern P. R. Co. v. United States* 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

court also noted a uniformity in price and the absence of free and unfettered competition within the industry. *Rice, supra,* at p. 456. Without question, the California fair trade laws violate the policies embodied in the Sherman Act.

On the other side of the balance, the policies of the Twenty-first Amendment and the California price maintenance provisions must be considered. As previously noted, the primary purpose of the Twenty-first Amendment is to allow a state to protect itself from the *"transportation* or *importation* of liquor *into* the state . . . for delivery or use therein." (Emphasis added.) See *United States v. State Tax Commission of Mississippi* 412 U.S. 363, 376, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973); *Lamp Liquors, Inc. v. Adolph Coors Co., supra,* 563 F.2d at p. 431. See also *Hostetter v. Idlewild Liquor Corp., supra,* 384 U.S. at p. 330.

Sections 24862 and 24866 of the California Business and Professions Code, which require bottled wines to be sold to licensed California retailers at prices contained in fair trade contracts or filed price schedules, and to be sold to California consumers at not less than prices contained in such fair trade contracts or filed price schedules, do not regulate "transportation or importation" of liquor into California. Therefore, the statutes do not really fall within the literal language of, or primary policies served by the Twenty-first Amendment. *Sail'er Inn, Inc. v. Kirby, supra,* 5 Cal.3d at pp. 12-13.

The price maintenance provisions are purportedly designed to promote orderly marketing conditions and prevent predatory pricing, thereby encouraging temperance and protecting small retailers. *Rice, supra,* 21 Cal.3d at p.

456. However, in rejecting the argument that fair trade laws are necessary to the economic survival of small retailers, *Rice* cited a Report of the Senate Judiciary Committee, which relied upon studies to conclude that the absence of fair trade had not injured small retailers.[5] (See U.S. Code Cong. & Admin. News at pp. 1569-1572 (1975).)

Further, fair trade laws have had little effect upon temperance. A report of the Moreland Commission in New York, cited in *Seagram & Sons v. Hostetter, supra,* 384 U.S. 35, at p. 39, and *Rice,* declares that "compulsory resale price maintenance had had no significant effect upon consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." See *Rice, supra,* 21 Cal.3d at p. 457. A 1974 California study found that per capita consumption of distilled spirits in California had increased by 42% between 1950 and 1972, and concluded that "There is little compelling evidence to suggest that . . . fair trade . . . promote(s) temperance . . ." (Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, at p. xi, 15, (1974).)[6]

Recent developments also reveal that fair trade laws are now contrary to public policy. California has recently repealed non-liquor fair trade laws, (See Stats. Ch. 402,

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[5]This report recommended repeal of the Miller-Tydings Act and the McGuire Act, and concluded that: "no evidence was presented to indicate that there were destructive predatory practices in states which have repealed Fair Trade Laws." U.S. Code Cong. & Admin. News, op. cit., at p. 1571 (1975).

[6]As *Rice* points out, other authorities have reached similar conclusions. (See e.g., Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages, vol. 3, at p. 69 (1974); Dunsford, State Monopoly and Price-Fixing in Retail Liquor Distribution, Wis. L. Rev. 454, 483 (1962).

at p. 878, (1975)), as have many other states. Hawaii repealed its liquor fair trade law just this year. (Ch. 708, Section 880, 1979 Laws of Hawaii, effective June 6, 1979).

Finally, as *Rice* noted, other provisions of California law promote the goals of the price maintenance statutes without conflicting with the Sherman Act. See *Rice, supra,* 21 Cal.3d at p. 458.

The Sherman Act seeks to promote important economic policies, and thereby protect all consumers. As previously discussed, these underlying policies are clearly violated and undermined by the California liquor price maintenance laws. When considered in light of the doubtful value of these price maintenance laws in promoting temperance, the clear national trend away from fair trade laws, the alternate means available to achieve the ends which such laws seek to attain, and the purpose of the Twenty-first Amendment, it must be concluded, as in *Rice,* that on balance the Sherman Act must prevail and Petitioner's Petition for Writ of Certiorari must be denied.

II

California Business And Professions Code Sections 24862 And 24866, Which Require the Posting of Resale Prices For Wines, Violate the Sherman Antitrust Act and Are Not Insulated Therefrom By the State Action Exemption

California Business and Professions Code Sections 24862 and 24866, and regulations promulgated thereunder, contain the price posting and resale price maintenance provisions for wine in California. In essence, those sections require the wine grower to post the prices at which Cali-

fornia wholesalers must sell to California retailers, and the minimum prices at or above which the retailer must sell to the consumer for consumption off the premises. These prices are posted monthly with the Department of Alcoholic Beverage Control on prescribed forms. If no new price is posted, the last price posted remains in effect. All applicable prices are set solely at the discretion of the wine grower. No guidelines or constraints are provided, and the state exercises no control over the prices that are posted.

In its original form the Sherman Antitrust Act (15 U.S.C. Section 1) stated:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Thereafter, Congress adopted two significant amendments relevant to the instant controversy. The first was the Miller-Tydings Act (50 Stat. 693) which permitted fair trade contracts prescribing minimum resale prices for certain goods. The second was the McGuire Act (66 Stat. 632), which permitted non-signer provisions, allowing the fixing of minimum resale prices at which commodities could be resold, even though a particular retailer had not entered into a fair trade contract for the commodity, provided the retailer had knowledge of an existing fair trade contract for the particular commodity.

Schwegmann Bros. v. Calvert Corp. 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) clearly states that absent amendments such as the Miller-Tydings Act and McGuire Act, resale price maintenance provisions such as those at issue here are illegal.

> "It is clear from our decisions under the Sherman Act, 26 Stat. 209, 15 U.S.C.A. Sections 1-7, 15 note, that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se*. Resale price maintenance was indeed struck down in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502. The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." 341 U.S. at p. 386, 71 S.Ct. at p. 746.

It should be noted that the McGuire Act was enacted in response to *Schwegmann*. However, in 1975, Congress repealed both the McGuire Act and the Miller-Tydings Act, thus leaving the Sherman Act essentially in its original form. Thus, the state of the law is much the same as it was at the time of the *Schwegmann* decision, but fair trade contracts are now disfavored as well. Thus, according to the *Schwegmann* rationale, price fixing and resale price maintenance as contemplated by the statutes at issue here are invalid.

Though the statutory language presently provides no exception to the Sherman Antitrust Act, case law has developed two doctrines which exempt conduct that would otherwise contravene that Act. One, the right to petition exemption (also known as the *Noerr-Pennington* doctrine, from the decisions in the cases of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14

L.Ed.2d 626 (1965)) permits an individual to seek legislation or invoke regulatory procedures that may otherwise constitute a restraint of trade, pursuant to the protections guaranteed by the First Amendment freedom of petition. The second, and the exemption of significance in the instant controversy, is the so-called state action exemption.

The state action exemption was first announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker,* this Court reviewed a state statute which created a marketing program for raisins which was intended to govern the quality of exported raisins and to maintain price stability. Under the program, a given number of producers in a particular area could seek the establishment of the marketing plan by petitioning the state Agricultural Prorate Commission, a nine-member body whose members included the Director of the Department of Agriculture and eight other members appointed by the Governor and confirmed by the Senate. The Commission reviewed the producers' petition, and was permitted, but not required, to approve it. The review process included a public hearing, economic findings and a showing that a prorate program would meet the goals of the Act without permitting unreasonable profits to the raisin producers. Upon the granting of the petition, the Director, with the approval of the Commission, selected a program committee from among the producers of the area. The program committee formulated the program itself. Public hearings were held on that proposal, and the Commission was authorized to approve, modify or reject the program. Upon approval by the Commission, the program was submitted to the raisin producers for final approval.

The Court, in setting forth the state action exemption, held that the Sherman Act

> "must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace,* 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L.Ed. 441; *Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 407, 48 S.Ct. 348, 351, 72 L.Ed. 624; *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122."
>
> *Parker v. Brown, supra,* 317 U.S. at 352, 63 S.Ct. at 314.

In contrast to the instant case, the Agricultural Prorate Act required public hearings at two different stages of the adoption of the program. The state was involved at each stage through a commission whose members were appointed by the Governor and confirmed by the Senate, allowing the state to actively participate in all aspects of the creation of the program. Additionally, in establishing prices, the

state was required to find that the program was not only necessary but that the result would not be excessive profits for the raisin producers. The price maintenance provisions of the Alcoholic Beverage Control Act contain no such state action. Prices are subject to whim and caprice of the wine growers. The state merely records the posted prices without review as they are received. Clearly the uncontrolled establishment of prices by wine growers, without review by the State, and subject to no real state control, cannot be considered to fall within the realm of the *Parker* holding.

In the intervening period since the *Parker* holding, this Court has been called upon to review that decision and to consider other factual situations in which one of the parties attempted to extend the state action exemption. However, while those decisions have clarified the scope of the exemption, the *Parker* decision remains essentially unchanged.

In *Goldfarb v. State Bar of Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court held that a minimum fee schedule for lawyers published by a county bar association and enforced by the State Bar Association violated the Sherman Act because the conduct in question was not required by either the State Supreme Court or the State Bar Association, but rather by the county bar association, which was not a state agency. Further no statutory provisions required the activities, and it was not enough that the fee schedules were "prompted" by mention of advisory fee schedules in the state ethical codes. 95 S.Ct. at 2014. The Court further noted that while the state has a compelling interest in regulating the practice of law within

the state, that, by itself, gives the state no authority to contravene the Sherman Act in such a manner.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court again examined the application of the *Parker* holding in the setting of a public utility which includes as part of its tariff, a program for providing free light bulbs to its electric customers. The Court held the program invalid, finding no state action. In so holding, the Court thoroughly reviewed the *Parker* decision, explaining the importance of state involvement in such programs. The Court found such state involvement lacking in the light bulb program, and further noted that there was no overriding statewide policy which was effectuated by the program.

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977), the Court was asked to rule on the validity of a state disciplinary rule and a rule of the State Supreme Court, both of which prohibited advertising by members of the bar. In upholding those provisions against claims of antitrust violations, this Court stated:

> "The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision. . . . Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy maker, the Arizona Supreme Court, in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation;

> we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." (citations omitted) 97 S.Ct. at 2697-2698.

Contrary to the assertions of Petitioner (see Brief at p. 22), the analysis of the state action exemption in *Rice* has not "created an intolerable situation of uncertainty and confusion in this area."

The four above-cited cases clearly show the impropriety of applying the state action exemption to the instant matter. The state plays no role whatever in setting the resale prices, whether the absolute wholesaler-to-retailer price or minimum retailer-to-consumer price. The prices are established purely at the unbounded discretion of the wine grower according to its own economic interest. The state does nothing more than enforce the price posting provisions; there is no control, or "pointed re-examination," as in *Bates,* to ensure that the practical effects of the price posting program are consistent with the Sherman Act. (Compare *Rice,* 21 Cal.3d at p. 445)

Finally, Petitioner totally misreads *Parker.* Petitioner states that *Parker* is applicable here because in both the Agricultural Prorate Program and in the Alcoholic Beverage Control Act, a comprehensive plan for marketing and/or sale, including price setting, had been adopted and was enforced by the state. However, that broad generalization fails to disclose the intensive state participation in *Parker,* and the lack of the same in the instant case.

In *Parker,* the prorate programs were established on an area-by-area basis. Upon petition, a *state commission* held

hearings and reviewed the petition; if satisfactory, the *state commission* established a local committee to formulate a program. The program was then submitted to the *state commission* for its approval. Hearings were again held; the commission was free to accept, reject or modify the program. No such control is present with regard to the alcoholic beverage industry in California.

The emphasis of the *Parker* court on the importance of close control and supervision by the state is underscored by the *Cantor* opinion. In *Cantor,* the Court noted that Chief Justice Stone made 13 references in a three-page discussion to the fact that state action was involved. Further, "[e]ach time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State." (*Cantor, supra,* 428 U.S. at p. 591, fn. 24) Thus, not only do California's price maintenance provisions violate the Sherman Act because there is no state action involved in the price posting scheme, but, as *Parker* indicates, the provisions are invalid because the conduct is carried out by private citizens, rather than public officials. (See *Parker,* 317 U.S. at p. 350) As the *Cantor* court noted at the conclusion of the above-cited footnote, "[t]he cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State) on the other hand."

The question before the Court is whether the state action exemption, in order to protect a price fixing law from the prohibitions of the Sherman Act, must be the act of the state itself or over which the state has the ultimate control,

or whether it is sufficient that the statute in question compels private persons to engage in anti-competitive conduct, but provides for no state control over those actions. *Parker* was emphatic in its holding that the act must be that of the state itself. Thus, California Business and Professions Code Sections 24862 and 24866 must be declared invalid, and Petitioner's Petition for Writ of Certiorari must be denied.

III

Petitioner Has Failed to Present Sufficient Grounds to Justify the Granting of Writ of Certiorari

A. The Rice Decision Has Created No Uncertainty or Confusion in California

Petitioner urges this Court to review the judgment and opinion of the Court of Appeal in the instant matter because "[t]he effect of the *Rice* case and the instant Midcal case has been to put the alcoholic beverage regulation in California into a state of great confusion and uncertainty . . ." (Brief of Petitioner, at p. 32).

In *Rice,* the California Supreme Court ruled invalid a California statute requiring the posting of minimum retailer-to-consumer prices by the brand owner of distilled spirits. There can be no doubt that that decision has spawned litigation, both through the administrative process (i.e., the Alcoholic Beverage Control Appeals Board) and through the courts. What Petitioner fails to recognize, however, is that the "confusion" is primarily due to a peculiar provision in the California Constitution which prevents the Director of the Department of Alcoholic Beverage Control from extending the holding of *Rice* to clearly analo-

gous statutory provisions. Thus, while the Director could have declared the sections at issue here invalid prior to the adoption on June 6, 1978, of Art. III, Section 3.5, a judicial determination is now required. Indeed, prior to the time the original pleadings were filed in the State Court of Appeal, the Director of the Department wrote two letters in which he stated that the Department would continue to enforce wine price posting provisions. (See Appendices A and B) In the second letter, addressed to Mr. John A. DeLuca, President of the Wine Institute, the Director states:

> "After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5 [now Art. III, Section 3.5, California Constitution], the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court."

The Alcoholic Beverage Control Appeals Board apparently feels similarly constrained. Thus, when faced with the issue of extending the *Rice* holding regarding distilled spirits to wines, the Board declined to do so citing Art. III, Section 3.5. (See *Capiscean Corporation v. Alcoholic Beverage Control Appeals Board,* 87 Cal.App.3d 996, 998, 151 Cal.Rptr. 492 (1979).)

More recently, the Board was asked to invalidate minimum consumer resale prices for beer (see In the Matter of Accusation Against Ferrigno, Appendix E to Petitioner's Brief). Though the Board noted that the provisions at issue in that case were probably invalid based upon *Rice* and *Capiscean,* the Board "is prohibited from declar-

ing said provisions invalid by reason of Art. III, Section 3.5 of the California Constitution." (Petitioner's Brief at E-8)

Further, the number of statutes within the Alcoholic Beverage Control Act subject to attack in California is limited, and it is inconceivable that the litigation with which Petitioner is concerned will persist. Additionally, while the *Rice* decision may have given the litigants encouragement to challenge statutory provisions, that decision certainly cannot be the sole reason for the attacks. Indeed, the section at issue in *Rice* had been attacked on numerous occasions in the past. (See, e.g., *Allied Properties v. Dept. of Alcoholic Beverage Control,* 53 Cal. 2d 141, 346 P.2d 737 (1959); *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control,* 65 Cal.2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966); and *Samson Market Co. v. Alcoholic Beverage Control Appeals Board,* 71 Cal.2d 1215, 81 Cal.Rptr. 251, 459 P.2d 667 (1969).) Thus, the *Rice* decision is merely a portion of a problem peculiar to the State of California, and is not of significant concern to warrant the granting of the Petition for Writ of Certiorari as prayed for by Petitioner.

It is also significant to note that in neither *Rice* nor the instant matter did the Director of the Department of Alcoholic Beverage Control seek review by this Court. Thus, while Petitioner expresses concern regarding the multiplicity of suits following *Rice,* the party most directly affected is notably disinterested.

B. Other States

Petitioner's fears regarding the effect of *Rice* on pricing statutes in other states, is, at this point in time, premature. Of the fourteen states which Petitioner cites as having resale price maintenance statutes, Hawaii has already repealed its statute (Ch. 708, Section 880, 1979, Laws of Hawaii, effective June 6, 1979). Among the other thirteen states, only New York has seen its pricing scheme challenged. Further, the only reported decision in that state came from the Appellate Division of the Supreme Court, one step removed from the state's highest tribunal, the Court of Appeals. Until the matter has been fully reviewed by the New York Court of Appeals, it is premature to allege conflict or confusion.

Petitioner also seems concerned about a statement by Justice Suozzi, concurring in *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority,* 410 N.Y.S.2d 893 (1978), in which he stated that his concurrence was based solely upon prior decisions, but that he felt that the *Rice* decision was correct and that New York's price maintenance statute violates the Sherman Act. Petitioner's chief concern seems to be that states across the land will follow *Rice.* Petitioner even suggests that because *Rice* is a California decision, it carries more weight. Such a characterization is unfair to the courts of other states, and fails to recognize the obvious—that the *Rice* case was correctly decided.

Because *Rice* was correctly decided, and because there are no conflicting decisions from other states, there is no need for this Court to grant the Writ of Certiorari as prayed for by Petitioner.

CONCLUSION

For each of the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be denied.

Dated: August 15, 1979

Respectfully submitted,

FRANK C. DAMRELL
DAMRELL, DAMRELL & NELSON
Attorneys for Respondent
Midcal Aluminum, Inc.

(Appendices Follow)

Appendices

APPENDIX "A"

(Letterhead of Department of Alcoholic Beverage Control, 1215 "O" Street, Sacramento 95814)

July 6, 1978

TO: ALL PRICE POSTING LICENSEES

As you are aware, the May 30, 1978, decision of the California Supreme Court in the matter of Rice v. Alcoholic Beverage Control Appeals Board struck down the consumer price maintenance provisions of Section 24755 of the Alcoholic Beverage Control Act.

Some confusion has arisen among price posting licensees as to the impact of that decision on related sections and regulations within the Act dealing with price filings at other levels.

The decision of the court, which is now in effect, dealt only with the *consumer* price filings for distilled spirits and beer. Accordingly, brand owners or authorized licensees who were previously filing forms ABC-705 (distilled spirits) and ABC-704 (beer) need no longer, and should not, continue to file those forms with the Department.

The question before the court and the resulting decision did not directly address or affect Sections 24862 (wine), 25000 (beer), and 24756 (distilled spirits) which require supplier level licensees to file price schedules showing the prices at which alcoholic beverages are sold to *retailers*.

Therefore, licensees who were previously filing price and discount schedules for prices at the wholesaler to retailer

level, including brewery to wholesaler in the case of beer, must continue to comply with the applicable sections of law and adhere to such prices and discounts on all sales.

Any question as to the constitutionality of the sections cited above must be resolved by legislative action or by a court decision. In the meantime, the Department has no choice but to continue to administer and enforce those sections of law.

/s/ Baxter Rice
Baxter Rice
Director

Distribution C-3

APPENDIX "B"

(Letterhead of Department of Alcoholic Beverage Control, 1215 "O" Street, Sacramento 95814)

(916) 445-3221

July 11, 1978

Mr. John A. De Luca
President
Wine Institute
165 Post Street
San Francisco, CA 94108

Dear Mr. De Luca:

In your letter of July 7, 1978, the following question is posed:

> "Until legislative or court action further clarifies and defines the scope of the California Supreme Court's decision in the case of Rice v. Alcoholic Beverage Control Appeals Board, will the California Department of Alcoholic Beverage Control continue to administer and enforce those provisions of Sections 24862 and 24866 of the Alcoholic Beverage Control Act which require wine suppliers to post minimum *consumer* prices?"

After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5, the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court.

Among the sections the Department will continue to enforce are those you mention, i.e., Sections 24862 and 24866 of the Alcoholic Beverage Control Act.

If we may be of further assistance, please call on us.

Sincerely,

/s/ Baxter Rice
Baxter Rice
Director